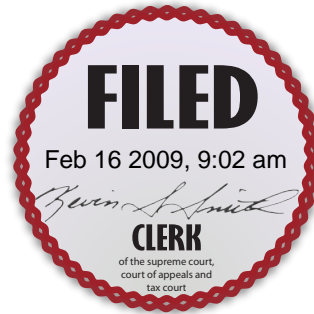


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JUSTIN HICKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0804-CR-213
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0612-FA-33

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**February 16, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Justin Hicks (“Hicks”) appeals after a jury trial from his convictions and consecutive sentence for attempted child molesting,<sup>1</sup> a Class A felony, attempted child molesting,<sup>2</sup> a Class C felony, and five counts of child solicitation,<sup>3</sup> each as a Class C felony. Hicks raises several issues for our review. However, one issue is dispositive: whether Hicks can be convicted of attempted child molesting when the intended victim is not actually a minor. Hicks does not challenge his convictions for child solicitation.

We reverse and remand with instructions.

### **FACTS AND PROCEDURAL HISTORY**

Beginning in November 2006, Sergeant Thomas Davidson of the Lafayette Police Department conducted an Internet solicitation investigation operating under the online persona “Kaylas793” (“Kayla”) for the purpose of chatting in Yahoo! chat rooms. “Kayla’s” Yahoo! online profile listed her as a thirteen-year-old female resident of Indiana. Hicks engaged in numerous sexual conversations with “Kayla” through the chat room and instant messages. Ultimately, a meeting was arranged between “Kayla” and Hicks at a town home used by the Lafayette Police Department for their “take down” operations. Hicks, who believed he was going to meet a thirteen-year-old girl, was arrested after he arrived at the town home.

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<sup>1</sup> See Ind. Code §§ 35-41-5-1; Ind. Code § 35-42-4-3.

<sup>2</sup> See Ind. Code §§ 35-41-5-1; Ind. Code § 35-42-4-3.

<sup>3</sup> See Ind. Code § 35-42-4-6.

The State charged Hicks with one count of attempted child molesting, a Class A felony, one count of attempted child molesting, a Class C felony, and five counts of child solicitation, each as a Class C felony. Prior to trial, Hicks filed a motion to dismiss the two counts of child molesting, arguing that no child under the age of fourteen existed in connection with the case, as “Kayla” was, in fact, an adult male detective with the Lafayette Police Department. *Appellant’s App.* at 72. The trial court denied Hicks’s motion.

After the State rested, Hicks filed a written motion and orally requested a directed verdict on the attempted child molesting counts. The trial court denied Hicks’s motion. At the conclusion of a jury trial, Hicks was found guilty as charged. At Hicks’s sentencing hearing, he renewed his motion for judgment notwithstanding the verdict on those counts. The trial court again denied Hicks’s motion.

The trial court sentenced Hicks to a total sentence of forty years, with fifteen years executed in the Department of Correction, and five years of probation, followed by twenty years of unsupervised probation. Of that sentence, Hicks received a twenty-five year sentence for the Class A felony attempted child molesting conviction, and a two and one-half year sentence for the Class C felony attempted child molesting conviction. Hicks now appeals.

### **DISCUSSION AND DECISION**

Hicks argues we must reverse his convictions for attempted child molesting because the State failed to allege or prove that an actual child existed and that the child was under fourteen years of age. We agree.

In *Aplin v. State*, 889 N.E.2d 882 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*, the defendant was charged with child solicitation and attempted sexual misconduct with a minor for engaging in sexual communications via the Internet with a police officer posing as a fifteen-year-old girl, arranging to meet the “girl,” and then going to the location of the meeting. We held that for the offense of attempted sexual misconduct with a minor, the intended victim must be a minor. *Id.* at 884-85. We noted that the appropriate charge in those circumstances was child solicitation, where “the State is not required to prove the actual age of the victim but may prove the solicitor’s belief that the solicitee is a minor.” *Id.*

More recently, in *Gibbs v. State*, No. 49A02-0712-CR-1017, 2008 WL 5413081, at \*1 (Ind. Ct. App. Dec. 31, 2008), following the holding in *Aplin*, we held that a defendant cannot be convicted of attempted sexual misconduct with a minor and attempted dissemination of matter harmful to minors where the intended victim is not actually a minor. There, as here, the State argued that *Aplin* was incorrectly decided. However, as noted by this court in *Gibbs*, our Supreme Court denied transfer in *Aplin*. *Id.* at \*4.

We believe that *Aplin* was correctly decided and guides our decision here. In the present case, for both of the counts of attempted child molesting, the State was required to prove that the offense is committed with a child under fourteen years of age. *See* Ind. Code § 35-42-4-3(a) & (b). Here, there was no actual child under the age of fourteen. Rather, Sergeant Davidson had assumed the online persona of a thirteen-year-old girl for the purposes of an Internet solicitation investigation. Accordingly, Hicks’s convictions of attempted child molesting, a Class A felony, and attempted child molesting, a Class C felony,

must be reversed. Furthermore, because of our resolution of this issue, we do not reach Hicks's arguments regarding jury instructions and sentencing.

Remand with instructions to the trial court to vacate these convictions and sentences.

BAKER, C.J., and NAJAM, J., concur.